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**THE DISTRICT COURT OF GUAM**

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| GUAM CONTRACTORS ASSOCIATION, *et al*.,<br><br>Plaintiffs-Petitioners,<br><br>vs.<br><br>JEFFERSON B. SESSIONS, III,<br>Attorney General of the United States, *et al*.,<br><br>Defendants-Respondents. | CIVIL CASE NO. 16-00075<br><br>**ORDER RE CLASS CERTIFICATION** |
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Plaintiffs have moved to certify a class in this case, which features various claims of unlawful agency action by USCIS arising from its adjudication of H-2B visa applications submitted by Guam employers in recent years. ECF No. 7. Specifically, they ask for certification of the following class:

> "Petitioners who have filed or will file an I-129 application for H-2B workers for Guam under one of the following two categories:
>
> 1. Peakload Need (the "Peakload Subclass"); or
> 2. One-Time Occurrence (the "One-Time Occurrence Subclass");
>
> And who have received or will receive a denial of such I-129 application based on a finding that the Petitioner is unable to demonstrate "temporary need."

ECF No. 7 at 5–6. Defendants oppose certification on four grounds. ECF No. 90 at 3–4. They contend Plaintiffs present no justiciable claims for relief, suggesting the class cannot be certified because the claims are moot, or not yet ripe, or both. *Id*. at 4–8. They also question whether the class is adequately ascertainable. *Id*. at 8–11. They add contentions that Plaintiffs cannot meet Rule 23's commonality and typicality prerequisites for certification. *Id*. at 11–14. And they duplicate their commonality and typicality arguments in contending Plaintiffs fail to satisfy Rule 23's separate and distinct adequate representation requirement. *Id*. at 15–17. Plaintiffs have timely replied in support of their motion, and they have added a request that the court strike Defendants' opposition as untimely, given that the opposition was filed approximately 500 days after its due date. ECF No. 90. The court has reviewed the parties' submissions, the limited record, and the relevant authority, and has determined a hearing on the motion is unnecessary. The court **DENIES** the motion to strike and **GRANTS** the motion for class certification.

**I. Plaintiffs' Motion to Strike**.

Addressing first the motion to strike, the court notes Plaintiffs moved for class certification on October 13, 2016. ECF No. 7. The court's local rules required a response to the motion by November 3. Civ. L. R. 7(f). Defendants, in lieu of responding directly to the motion, moved on October 27 to stay proceedings on Plaintiffs' motion; in the alternative, they asked for an extension of their opposition deadline to December 9. ECF No. 10. The court eventually granted the motion to stay in July 2017, but the grant came well after both Defendants' November 3, 2016 deadline and their requested December 9 alternative. ECF No. 59. The court's order was silent regarding any revival of those long-expired deadlines. *Id*.

That short procedural history suffices to highlight the disconcerting fact that Defendants filed a motion to stay, apparently assumed the motion would be granted, and apparently relied on that assumption in failing to file a response for at least the next eight months. As a general rule,

the courts agree that course of conduct is unacceptable—a pending motion to stay does not excuse failure to comply with deadlines; if it did, "the court would in large measure lose the power to grant or deny" the motion in the first place. *Spencer Med. Assocs. v. C.I.R.,* 155 F.3d 268, 272 (4th Cir. 1998); *Erickson v. Ford Motor Co*., 2007 WL 5527512, at *4 (D. Mont. Nov. 14, 2007). Defendants make these tactical wait-and-see decisions at their own risk. *See, e.g., Miksis v. Howard*, 106 F.3d 754, 760 (7th Cir. 1997). And where they make the tactical decision and then later fail to comply with their own requested extended deadline, the courts are even less sympathetic, and the late filings are frequently and appropriately stricken. *Id.*; *see also Erickson,* 2007 WL 5527512, at *6.

Nevertheless, the court recognizes the rules of civil procedure are to be "construed and administered to secure the just . . . determination of every action and proceeding," and that it is often contrary to the spirit of the rules to avoid the merits of a matter based on the parties' technical failures. Fed. R. Civ. P. 1; *see also Foman v. Davis*, 371 U.S. 178, 181 (1962). The rules, in other words, are "to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits." *Ahanchian v. Xenon Pictures, Inc*., 624 F.3d 1253, 1258–59 (9th Cir. 2010). Consistent with that spirit, the court notes, Rule 6(b) permits extensions for good cause where a motion is made before the original deadline has run. *See* Fed. R. Civ. P. 6(b). Defendants moved to stay, of course, before their initial deadline. And they might reasonably have read the court's July 25, 2017 and March 5, 2018 orders to revive and extend their deadline. Although the parties have neither addressed for the court whether Rule 6 applies nor cited any other authority for determining whether Defendants' opposition may be considered, given the nature and course of this proceeding and the court's own delays in addressing the case, the court will conclude Rule 6 does apply and find good cause for continuing Defendants'

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opposition deadline.[1]

And in the alternative, the court will conclude, for the sake of just examination and determination of the important question here, that its July 25, 2017 order held the certification question and associated deadlines in abeyance retroactively, so that Defendants' opposition may now be considered timely. The court will therefore deny Plaintiffs' motion to strike.

**II. Class Certification**.

*Justiciability—Mootness and Ripeness*. Turning to certification, as a first objection, Defendants replicate the mootness and ripeness arguments made in their motion to dismiss—arguments the court addressed in denying that motion. Mootness, of course, does not generally provide a basis for denial of certification; instead, the question is more sensibly addressed in a motion to dismiss, as it was here. *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) ("[M]ootness of the Petitioner's claim is not a basis for denial of class certification, but rather is a basis for dismissal of Petitioner's action."). Nevertheless, the court notes Defendants contend that (1) because the employers' periods of need for which they originally submitted petitions have now expired, the court cannot provide them with any meaningful relief, and (2) because no future petitions have yet been identified, any claim of injury regarding those petitions is at best speculative and hypothetical and therefore unripe. And because Plaintiffs have failed to demonstrate their claims are ripe and not moot, Defendants maintain, the class cannot be certified.

With respect to the possibility of mootness, that the employers' original periods of need have largely expired is clear. But equally clear here is the notion that frequently, the time elapsing between the USCIS denial and expiration of the period of need—sometimes a matter of

[1] The court notes the parties have briefed neither the good cause standard nor Rule 6(b)'s stricter excusable neglect standard here, and it may be that both apply, given Defendants' timely motion to stay but later failure to comply with their requested December 9 deadline. But in the absence of any Rule 6 presentation at all, the court concludes Defendants need not satisfy the excusable neglect requirements.

a few months, typically no more than year—has proven too short for any particular employer to seek and crucially, to receive, any effective injunctive relief from the courts. And thus, to achieve meaningful review of, and potentially relief from, USCIS's allegedly unlawful and continuing course of conduct, they have asked the court to certify the class. Various courts, faced with similar situations, have concluded these kinds of claims present easy exceptions to the mootness doctrine, because the challenged conduct or policy is capable of repetition yet evading review, and because the transitory nature of the claims and sometimes glacial pace of the courts often justifies relating certification of the class back to the date the complaint was filed—a time at which the dispute was clearly live even for the named plaintiffs here. *See, e.g., Los Angeles Unified Sch. Dist. v. Garcia,* 669 F.3d 956, 958 (9th Cir. 2012) ("[A]lthough Garcia's 'particular situation ... may have become moot,' the failure to provide special education services to eligible inmates in county jails is ongoing, and eligible inmates will usually not be incarcerated in the jail long enough to bring a legal challenge."); *DL v. D.C.*, 302 F.R.D. 1, 20 (D.D.C. 2013) ("The inherently transitory exception to mootness permits relation back in 'any situation where composition of the claimant population is fluid, but the population as a whole retains a continuing live claim.'). Because the controversy with respect to the proposed class is clearly still live based on the limited record before the court, because the claims here are both capable of repetition yet evading review and inherently transitory, and because any certification here may appropriately relate back to the date Plaintiffs filed their complaint, the court concludes mootness is no bar to certification here. *See, e.g., id*.

Defendants also object to justiciability based on ripeness, suggesting somewhat incomprehensibly that because Plaintiffs have not identified specific future H-2B petitions for which they will have received denials, they cannot demonstrate an immediate danger of direct injury, as is often required for purposes of judicial review. *See, e.g., Bova v. City of Medford,*

1 564 F.3d 1093, 1096 (9th Cir. 2009) ("[A] claim is not ripe for adjudication if it rests upon
2 contingent future events that may not occur as anticipated, or indeed may not occur at all."). But
3 for purposes of class certification, inclusion of future class members—i.e. those for whom no
4 claim has yet arisen—is neither unusual nor objectionable. *Rodriguez*, 591 F.3d at 1118. Future
5 members may by definition have claims arising in the future, and once those claims have arisen,
6 or ripened, those individuals may become members of the class. *Id.* And the lengthy review
7 process for these kinds of claims may mean the class composition changes frequently, even
8 continuously, as new members enter, but as the *Rodriguez* court made clear, that poses no
9 problem for certification, and the court cannot conclude it bars certification here. *Id.*

10 *Ascertainability*. As a second objection, Defendants point out that courts have sometimes
11 imposed, in addition to Rule 23's explicit class certification requirements, an "implicit"
12 requirement that a proposed class be "ascertainable" or "sufficiently definite." *See, e.g.,*
13 *Whiteway v. FedEx Kinko's Office & Print Servs., Inc.,* 2006 WL 2642528, at *3 (N.D. Cal. Sept.
14 14, 2006) ("An implied prerequisite to certification is that the class must be sufficiently
15 definite."). The Ninth Circuit, of course, has explained in no uncertain terms that it imposes no
16 such requirement and prefers that parties and courts address any alleged definitional deficiencies
17 by making reference to and analysis of Rule 23's actually-enumerated requirements. *See, e.g.,*
18 *Briseno v. ConAgra Foods, Inc.,* 844 F.3d 1121, 1125 n.4 (9th Cir. 2017) ("ConAgra cites no
19 other precedent to support the notion that our court has adopted an 'ascertainability' requirement.
20 This is not surprising because we have not."). That alone suggests ascertainability is no
21 impediment here.

22 But even a deeper look at Defendants' arguments regarding ascertainability reveals they
23 have actually made no definiteness or ascertainability argument at all. They merely reiterate
24 their justiciability concerns and add a contention that only a determination on the merits of

individual plaintiff's claims will reveal whether that plaintiff is a member of the proposed class. The justiciability contentions are unpersuasive, as explained above. And the latter contention appears to be wrong or incompletely made. There is no doubt that all involved, and particularly Defendants, will be able to determine both whether a petitioner has submitted an application based on a peakload or one-time occurrence need and whether that application has been denied based on a failure to demonstrate temporary need—and that is all the proposed class definition requires, without any determination at all of whether the denial has been lawfully made. *See, e.g., Perez-Funez v. Dist. Dir., I.N.S.*, 611 F. Supp. 990, 995 (C.D. Cal. 1984) (concluding class was sufficiently definite, reasoning "it is a simple matter to determine if a child is (1) known or claims to be under the age of eighteen, (2) is in the custody of the INS, and (3) is not accompanied by a natural or lawful parent.").

Because the Ninth Circuit imposes no separate ascertainability requirement for class certification and because Defendants have made no actual ascertainability arguments, the court cannot conclude the proposed class here presents any ascertainability or definiteness problems.

*Commonality and Typicality*. Regarding Rule 23's actual requirements for class certification, Defendants contend Plaintiffs cannot meet the requirements because they cannot establish that questions of law or fact are common to the class, and because each petitioner may present unique circumstances rendering their disposition distinct from, and therefore atypical amongst the dispositions of every other petitioner. Rule 23(a) sets forth four requirements for class certification; the two at issue[2] with respect to these specific objections are the requirement that "there are questions of law or fact common to the class" (the commonality requirement) and

[2] In addition to these two requirements and a third requirement of "adequacy of representation" addressed below, Rule 23 imposes a "numerosity" condition, which requires for certification that a "class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23. Defendants have not challenged the numerosity requirement here, and based on (1) the limited evidence of record and the relevant estimates offered by both parties at various points in the proceeding, and (2) the impracticability of joinder given the scope of the information within Defendants' exclusive control, the court finds the requirement satisfied. *See, e.g., Perez-Funez v. Dist. Dir., I.N.S.*, 611 F. Supp. 990, 995 (C.D. Cal. 1984).

1 the requirement that "the claims or defenses of the representative parties are typical of the claims
2 or defenses of the class" (the typicality requirement). Fed. R. Civ. P. 23(a).
3 The commonality requirement, the Ninth Circuit has explained, is designed in large part
4 to promote two goals: (1) to ensure that absentee members are fairly and adequately represented;
5 and (2) to ensure practical and efficient case management. *Walters v. Reno*, 145 F.3d 1032, 1045
6 (9th Cir. 1998). The requirement is thus construed "permissively." *Hanlon v. Chrysler Corp.*,
7 150 F.3d 1011, 1019 (9th Cir. 1998). As the *Hanlon* court observed, it is not necessary that
8 "[a]ll questions of fact and law ... be common to satisfy the rule." *Id.* Instead, classes featuring
9 shared legal issues but having "divergent factual predicates" will satisfy the commonality
10 requirement, as will classes sharing a "common core of salient facts" but containing members
11 requiring "disparate legal remedies." *Id.*; *see also Rodriguez*, 591 F.3d at 1122. In other words,
12 the *Rodriguez* court explained, the commonality requirement looks "only for some shared legal
13 issue or a common core of facts." *Rodriguez*, 591 F.3d at 1122. And the requirement is thus
14 satisfied where a common question may be posed by every member of the proposed class and
15 their entitlement to relief may be determined largely by its answer. *Id*.
16 Here, as is clear from Plaintiffs' proposed class definition, all proposed class members
17 may pose at least the following question: has a peakload or one-time occurrence H-2B petition
18 been unlawfully denied for failure to establish temporary need? And any entitlement to relief
19 may be determined largely by the answer to that question. Surely the nature of any particular
20 petitioner's circumstances may play a role in determining that petitioner's entitlement to relief,
21 but as Plaintiffs observe, it appears that "[a] common answer regarding the legality of the
22 challenged agency policy and practice [may] resolve the litigation [i]n 'one stroke' "—and that
23 may be all the commonality requirement asks. *Id*. at 1123 (concluding commonality was
24 satisfied where the "issue at the heart of each class member's claim for relief is common"). A

commonality finding also, of course, serves the second goal of the requirement, as an answer to the question of the lawfulness of the agency practice here derived against the backdrop of all class member's claims may aid the court in developing a framework for determining whether any particular class member is entitled to relief, and will surely aid the class members with sometimes transitory claims in securing meaningful relief in the event they are entitled to it. *Id.* The proposed class here thus poses common questions of law and fact, fairly and adequately represents absentee members, and ensures practical and efficient case management, and the court concludes it satisfies Rule 23's commonality requirement.

The typicality requirement asks a sometimes analytically distinct question—namely, as stated in Rule 23, whether the claims of the class representatives are typical of those of the class. Fed. R. Civ. P. 23. The requirement is satisfied whenever each class member's claim may be said to arise from the same course of events, and each class member may make similar legal arguments in support of liability. *See, e.g., Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001). The typicality requirement, much like the commonality requirement, is "permissive" and requires only that a representative's claims be reasonably co-extensive with those of absent class members; they need not be substantially identical. *Rodriguez*, 591 F.3d at 1124 (internal quotation marks omitted).

Here, Plaintiffs' claims of unlawful activity by USCIS will match closely those of any member of the proposed class—each will have submitted an H-2B petition based on a peakload or one-time occurrence need, each will have had a petition denied based on failure to demonstrate temporary need, and each will claim the denial is unlawful for reasons the same as or similar to those set forth in Plaintiffs' complaint. Whether any petitioner may be ineligible for relief based on particular characteristics (as, for example, in the case of Defendants' hypothetical petitioner who submits no evidence at all in support of the temporary nature of his need) is a

separate question that need not have any bearing at all on the question of whether the agency's current or past practice or activity has been unlawful. *See, e.g., Rodriguez*, 591 F.3d at 1124 (9th Cir. 2010) ("The particular characteristics of the Petitioner or any individual detainee will not impact the resolution of this general statutory question and, therefore, cannot render Petitioner's claim atypical."). Because the claims of the class members here appear to arise from the same course of events and each class member will make similar legal arguments in support of relief, the court cannot conclude the proposed class fails to meet Rule 23's typicality requirement.

*Adequacy of Representation*. Defendants also appear to object to certification on the basis of adequacy, although they raise no adequacy-specific arguments and instead raise again their justiciability and commonality concerns. Nevertheless, because the court is tasked with engaging in a probing review of the certification question, the court examines the adequacy question here as well.

In addition to its numerosity, commonality, and typicality requirements, Rule 23 imposes a requirement that "the representative parties will fairly and adequately protect the interests of the class" (the adequacy requirement). Fed. R. Civ. P. 23(a). Whether class representatives satisfy the adequacy requirement will depend on "the qualifications of counsel," whether the possibility of "antagonism" arises, whether class representatives and absentee members "share interests," and the likelihood that a suit may be collusive. *See*, *e.g., Walters*, 145 F.3d at 1046.

Defendants address none of those considerations. But the court on independent investigation finds each consideration counsels in favor of finding the adequacy requirement satisfied: counsel for the class heads a well-established, employment-based immigration practice, is a frequent lecturer on topics related to employment-based immigration law, has litigated similar claims in the past, and has ably represented the named plaintiffs here; no substantial risk of conflict or antagonism appears likely to arise; the class representatives and absentee members

share an interest in obtaining the specific relief requested by the class representatives; and no allegations of collusion have arisen or appear likely to arise. Defendants' duplication of the commonality and typicality arguments does not change the analysis. *See Rodriguez*, 591 F.3d at 1125 (noting respondents challenged adequacy "only by re-asserting their commonality and typicality arguments" and finding them meritless). Whether certain class representatives or certain absentee members may present factual circumstances rendering them ineligible for relief on their underlying claims has no bearing on whether the class representatives may vigorously pursue the class claims and appropriately represent the absentee members' interests—and that is all the adequacy requirement asks. *See, e.g., Walters*, 145 F.3d at 1046 ("Once again, the government erroneously emphasizes factual differences in the merits of the underlying document fraud charges. Such differences have no bearing on the class representatives' abilities to pursue the class claims vigorously and represent the interests of the absentee class members.").

The court therefore concludes the representative parties will fairly and adequately protect the interests of the proposed class, and concludes the adequacy requirement poses no problem for certification.

*The Rule 23(b) Requirement*. Although Defendants have not objected to certification on the basis of Rule 23(b), the court notes that in addition to satisfying the prerequisites of Rule 23(a), the class representatives must demonstrate the proposed class meets at least one of the three conditions of Rule 23(b). *See Walters*, 145 F.3d at 1045. And Plaintiffs have satisfied at least the Rule 23(b)(2) condition here, which requires that they establish that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This condition, the *Rodriguez* court has explained, does not require examination of the likelihood of success of or foundation for any of the underlying

claims; instead, it merely asks whether "class members seek uniform relief from a practice applicable to all of them." *Rodriguez*, 591 F.3d at 1125. And here, as explained above, the proposed class members will challenge the recent and continuing USCIS practice in adjudicating one-time occurrence and peakload H-2B petitions, and they seek as relief a declaration that the practice is unlawful and an injunction requiring USCIS to abstain from the practice, among other things. To be clear, it may be the case in the end that the USCIS practice has not been unlawful—but that is irrelevant for purposes of determining whether this "relief appropriate to the class as a whole" condition is satisfied. *See, e.g., Rodriguez*, 591 F.3d at 1126 ("The particular statutes controlling class members' detention may impact the viability of their individual claims for relief, but do not alter the fact that relief from a single practice is requested by all class members.").

Plaintiffs, in other words, have satisfactorily established that the proposed class challenges a common practice and requests common relief, and the court concludes the Rule 23(b)(2) requirement has been satisfied.

**III. Conclusion.**

Plaintiffs' motion to strike (ECF No. 90) is **DENIED**. Because Plaintiffs have satisfied the Rule 23 requirements, their motion for class certification (ECF No. 7) is **GRANTED**.[3] Having found the Rule 23 requirements satisfied, the court certifies the following class and subclasses:

Petitioners who have filed or will file an I-129 application for H-2B workers for Guam under one of the following two categories:

1. Peakload need (the "Peakload Subclass); or

[3] The court notes, as the parties are no doubt aware, that Rule 23 provides for alteration or amendment of an order granting certification, based on a wide variety of considerations, at any time before the imposition of final judgment. Fed. R. Civ. P. 23(c)(1)(C).

2. One-Time Occurrence (the "One-Time Occurrence Subclass")

And who have received or will receive a denial of such I-129 application based on a finding that the Petitioner is unable to demonstrate "temporary need."

Attorney Jeff Joseph, counsel for the named plaintiffs, is **appointed as class counsel** under Rule 23(g), having skillfully litigated this case thus far and possessing the requisite experience, knowledge, and resources to commit to the case as required by the rule. The parties **shall confer** with respect to the proposed notice to class members required by Rule 23, and Plaintiffs **shall file a proposed notice** no later than **April 30, 2018**.

**SO ORDERED**.

**/s/ Frances M. Tydingco-Gatewood**
**Chief Judge**
**Dated: Mar 31, 2018**